of a set-off in this action, and must be deducted from the amount paid by the plaintiff.

This amount he has received from the defendants, and is estopped from denying their title to it. Judgment must be given for the plaintiff for the balance, with interest, to wit, $18,527 54.[1]

In the Supreme Court of New York—Oswego General Term, 1856.

ISAAC H. BROWN *against* JACOB GOLDSMITH ET AL.

1. When a party calls for a part that was said at an interview of the parties, it does not follow that the other party may show all that was said. He may show so much of the conversation as made a part of the negotiations, or a part of the res gesta.

2. The court will not grant a new trial, even if the ruling of the judge was wrong; if upon the whole case justice has been done.

This action was upon a contract to pay the plaintiff a certain sum for making collections. The contract was by parol. The evidence showed the defendant settled the suit after the plaintiff had commenced, and without the consent of the plaintiff, on the ground that the plaintiff had sued a party that he agreed not to prosecute. The plaintiff in this suit showed by a witness that he was present when the defendants settled the suit. The defendants' counsel asked for all that was said at that interview, with the intention of showing what the defendants said about plaintiff's taking the claim. The justices trying the cause admitted the evidence, and the jury returned a verdict for the defendants.

The plaintiff appealed.

Charles Andrews, for plaintiff.

N. F. Graves, for defendants.

The opinion of the court was delivered by

BACON, J.—I am inclined to think that the testimony allowed to be given on cross-examination of the witness, Rosenbeck, was improperly admitted. It was on the presumption that a portion of the conversation had been given, and the defendants were entitled

[1] The reader is referred to the cases of Sharpless *v.* Philadelphia, 9 Harris, 147–188; 2 Am. Law Reg., 1, 27, 85; Moers *v.* Reading, 9 Harris, 188–203.—*Eds. Am. Law Reg.*

to the whole, but as the case reads, no such foundation seems to have been laid for its introduction. But the same facts, in substance, were afterwards proved by the witness, Rosenbaum, and I can see no valid objection to his testimony. It was not in conflict with any thing stated in the letters which alluded to a verbal agreement, which this testimony explained and illustrated. If there had been no cross-examination of Rosenbeck, the jury were well warranted, by the testimony of Rosenbaum, in arriving at the conclusion they did. The case was put to the jury as one of conflicting testimony between Rosenbaum and the son of the plaintiff, and as between the two, it is evident they believed the former told the truth, no injustice having been done, the verdict should not be set aside. The judgment, in my opinion, should, accordingly, be affirmed.

ALLEN, J.—I am of opinion that the justice erred in admitting evidence of the declaration of defendants at the time they settled the debt against Adler & Gravenn. The plaintiff had not called for any declarations of the defendant on that occasion. They had proved a fact, to wit:—the compromise and discharge of the debt; and it would probably have been competent for defendants to prove what was said concerning the settlement, and so much of the conversation as made a part of the negotiation as a part of the res gestæ, and to show what was done, and had the plaintiff called for any part of the conversation, the defendants could only have given so much of the residue of the conversation, as tended to qualify that given in evidence by the plaintiffs, and no more; that is, they could have given all upon the same subject.[1] But there is no pretence that the plaintiff had directly or indirectly called for any declarations of the defendants concerning the agreement between them, and the conversation was admitted under the offer to show "what defendant may have said about plaintiff's taking the claim." The evidence was erroneously admitted, and we cannot say that it did not influence the result.

The judgment must be reversed and a new trial granted; costs to abide events. New trial granted.

[1] See 1 Greenl. on Evid. § 108.—*Eds. Am. Law Reg.*